STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 7, 2002
V	No. 226063 Charlevoix Circuit Court
LEE DAVID WILKS, Defendant-Appellant.	LC No. 00-045309-FH

Before: Wilder, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree criminal sexual conduct (CSC III), MCL 750.520d, and was sentenced as a third habitual offender, MCL 769.11, to fifteen to thirty years' imprisonment. Defendant received credit for 105 days served. He now appeals as of right both his conviction and sentence. We affirm.

I. Facts and Proceedings

Defendant's conviction arouse out of the events of December 4, 1999. On that night, the twenty-one year old victim left work at approximately 12:30 a.m., and went to a bar with her roommate, Pamela Rahn, where they met two friends, Joe Reedy and Bobby Detlaff, and defendant ("the group"). While at the bar, the victim had two or three beers before "last call." After "last call" the group decided to go back to the victim's home to continue drinking and to play cards. Once there, the group started drinking, talking, and playing cards and dice.

Eventually, the victim got "extremely tired" and decided to go to bed. She wore boxer shorts and a tee shirt to bed. At trial, the victim testified that after falling asleep, she awoke to find defendant on top of her, and that she rolled onto her side and told him "no." The victim then testified that defendant stood up, looked at her, laughed, informed her that he "wasn't going out like that," removed her boxer shorts and underwear, and had sexual intercourse with her. The victim testified that she never encouraged the intercourse in any way and that she "froze" after defendant began to assault her. After the assault, both Detlaff and Rahn entered the bedroom, and the victim informed them that defendant had raped her. Rahn then left the bedroom, and began arguing with defendant about what he had done. During the argument, defendant denied having done anything, and eventually left the house. According to the victim, as defendant left

the house he stated that he "didn't do anything" and that the victim was lying. The victim then contacted her parents and went to the hospital.

At trial, Reedy corroborated the victim's testimony that preceding the rape the group had been drinking, playing cards, and that the victim got tired and went to bed. He also testified that while he was in Rahn's bedroom, defendant knocked on the door and stated that he was ready to leave and that "[w]'eve got to go." According to Reedy, defendant was "kind of in a hurry," however, he also testified that defendant denied the allegations. Reedy also contradicted the victim's testimony by testifying that the victim and defendant had discussed sexual foreplay that evening. However, Detloff contradicted Reedy's testimony on this point, and corroborated the victim's testimony, by testifying that he had not heard the victim and defendant discuss sex that evening. Detloff's testimony also differed from the victim's testimony in that he testified that she told him that she could not remember how she became undressed.

Rahn testified that she did not remember the victim and defendant discussing sex that evening, and that Detloff told her that defendant had raped the victim, and was in a hurry to leave. Rahn also testified that after being confronted and while leaving the house, defendant told the group, "shit yes I raped her," and said that he had "raped the ugly bitch."

Defendant admitted having sex with the victim, and claimed that the victim consented to sexual intercourse. Specifically, he testified that after the victim went to her bedroom, he entered the bedroom in order to reach the bathroom, which was only accessible through the victim's room. He further testified that when he entered the bedroom, the victim was awake and they engaged in "idle talk," "one thing led to another," they began to kiss, and then had consensual sexual intercourse, after which he decided to leave the bedroom.

Following closing arguments and jury instructions, the jury deliberated for forty-eight minutes and found defendant guilty of CSC III. On March 17, 2000, the trial court conducted a sentencing hearing. At the hearing, the trial court stated that defendant had been convicted of CSC III and that defendant was a habitual third offender, which meant that defendant's maximum prison sentence could be thirty years. The trial court also indicated that he had referred the matter to the probation department for a pre-sentence investigation report (PSIR). At that point, both defendant and defense counsel declined to make a statement before sentence. The prosecutor then provided the trial court with two judgment of sentences regarding defendant's previous felony convictions, which defendant acknowledged, asked the trial court to focus on the victim's statement contained in the PSIR and to sentence defendant to the maximum term of imprisonment. The trial court then sentenced defendant to prison for fifteen to thirty years, which departed from the minimum sentence recommendation of 36 to 106 months. In departing from the minimum sentence, the trial court stated, in part:

> The Defendant is age 26. . . . [H]e was unemployed at the time of this offense and he's never held a job for more than six months. He has an extensive juvenile record, including time spent at Boys Training School. . . .
>
> He has two previous felony convictions and one misdemeanor conviction. And he went to prison on a conviction of gross indecency between males. He served 60 months of a 30 to 60-month sentence.

> And while he was in prison he obtained or incurred 20 major misconducts, including assaulting staff, fighting with other inmates, substance abuse, possession of dangerous contraband, disobeying a direct order and destruction of prison property.
>
> * * *
>
> He has an extensive history of assaultive behavior. And he seems to have an attitude that he can do anything to anybody and he doesn't care what the consequences are; and as such, he presents a serious danger to society.
>
> The sentencing guidelines suggest a minimum sentencing range of 36 to 106 months. And the probation parole officer I think correctly states that the primary focus of this sentence should be on the . . . protection of society. And I don't think that the guidelines allow me sufficient latitude to protect society.
>
> And the reason I say that are as follows. I think that insufficient weight was given to the juvenile record which included four assault adjudications. And the fact that he failed a commitment to Eagle Village and had to be committed to Maxi [sic] Boys Training School.
>
> The guidelines give no weight to the 20 major misconducts in prison and the assaultive and dangerous nature of many of those misconducts. The guidelines give no weight to the fact that he was released straight out of a maximum security prison with no parole after serving all of the five-year maximum sentence for a sex crime.
>
> The guidelines give no weight to the fact that [defendant] was involved in the gross indecency between males conviction. That was a non-consensual act. That is they give no weight to the fact that it was a non-consensual act. . . .
>
> The guidelines give no weight to the fact that the Defendant was on felony probation when he committed this crime. And they give insufficient weight to the escalation in severity of [defendant's] assaultive behavior, from aggravated assault as a juvenile to assault[s] on . . . corrections officers to forcible rape.
>
> And I think those are substantial and compelling reasons to depart from the guidelines. Accordingly, [defendant], it is the sentence of this Court that you be sentenced to serve a prison term . . . of not less than 15 years and a maximum term of not more than 30 years. And you are to be given 105 days credit against the sentence.

On appeal, defendant challenges both his conviction and the trial court's deviation from the sentencing guidelines.

II. Analysis

A. Cross-Examination of Rahn

Defendant first argues that the trial court erred when its failure to allow defendant to introduce evidence that he denied the assault, prevented him from putting his alleged remarks to Rahn admitting the rape in the proper context. We disagree. The decision to admit evidence is within the discretion of the trial court and will not be disturbed by this Court absent a clear abuse of that discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

Specifically, defendant contends that because Rahn testified that defendant admitted the rape, he should have been permitted to also ask her whether defendant had also denied the rape. However, any denial of the rape by defendant, if offered to prove the truth of the matter asserted, would have been inadmissible as hearsay. *People v Jensen*, 222 Mich App 575, 580-581; 564 NW2d 192 (1997); MRE 801(c), 802. In contrast, defendant's statements to Rahn admitting the rape clearly were admissions made by a party-opponent; thus, under MRE 801(d)(2)(A) were not hearsay.

Defendant's reliance on the "rule of completeness," as delineated in *People v Badour*, 167 Mich App 186, 190; 421 NW2d 624 (1988), rev'd on other grounds sub nom *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990), is misplaced. There, the trial court's decision was based on MRE 106. *Id*. MRE 106 provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

In *Badour*, *supra* at 191, the trial court permitted the entire preliminary examination transcript "in order to explain the victim's apparent confusion in light of the complexity of the questions posed to her and to prevent her statement from being taken out of context," which as this Court held "was consistent with MRE 106." *Id*. Here, defendant requested that the trial court admit unwritten and unrecorded statements made by defendant. Because neither *Badour* nor MRE 106 permit the introduction of unwritten or unrecorded statements, we are not persuaded that the trial court abused its discretion when it did not allow defendant to ask Rahn whether defendant also denied the rape. See MRE 801(c), 802, 803.

Defendant did not argue below that the questions were intended to elicit evidence not for the truth of the matter asserted, but instead in order to impeach Rahn's testimony. Thus, any error by the trial court in failing to admit the evidence on this ground has been waived. *People v Aldrich*, 246 Mich App 101, 116; 631 NW2d 67 (2001); *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992); MRE 103(a)(2). Even assuming the issue was not waived and that the evidence should have been admitted to impeach Rahn, the evidence was cumulative since defendant, the victim, Reedy, and Detlaff, all testified that defendant denied having raped the victim. In addition, during closing arguments defense counsel pointed out to the jury that Rahn was the only witness that testified that defendant had admitted raping the victim, and argued that Rahn's testimony was not credible. Hence, because any error in failing to permit the cross-examination was not "inconsistent with substantial justice," MCR 2.613(A), and did not result in a "miscarriage of justice," MCL 769.26, any error on the trial court's part was harmless and

does not require reversal. *People v Mitchell (On Remand)*, 231 Mich App 335, 338; 586 NW2d 518 (1998); MCL 769.26; MCR 2.613(A).

B. Prosecutorial Misconduct

Defendant also argues that the prosecutor improperly bolstered the victim's testimony by eliciting evidence of the victim's character for truthfulness from other prosecution witnesses. As a preliminary matter, we note that defendant failed to raise this claim of prosecutorial misconduct before the trial court. Thus, this issue has not been properly preserved. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). To avoid forfeiture of this issue, defendant must establish that errors occurred, and that these errors were clear or obvious and affected the outcome of the trial court proceedings. *People v Wyngaard*, 462 Mich 659, 668; 614 NW2d 143 (2000); *People v Schultz*, 246 Mich App 695, 709; 635 NW2d 500 (2001). To warrant reversal, the plain error must have resulted in the conviction of an actually innocent person or have seriously affected the fairness, integrity or public reputation of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

MRE 608(a) provides:

> The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attached by opinion or reputation or otherwise.

It is well settled that when defense counsel attacks the victim's character for truthfulness during opening statements, the prosecution, during direct examination, is entitled to present evidence supporting the victim's character for truthfulness. *People v Lukity*, 460 Mich 484, 489; 596 NW2d 607 (1999), citing *United States v Cruz*, 805 F2d 1464, 1479-1480 (CA 11, 1986); *United States v Jones*, 763 F2d 518, 522 (CA2, 1985). Here, defense counsel stated in part:

> And what you will hear that differs greatly from [the victim's] version is, is that [defendant] had consensual sex with her. . . .
>
> * * *
>
> Really only two people know what happened there, and that's [the victim] and [defendant]. The other adults who were in the trailer were not aware that anything was going on, and didn't become aware of anything until later on when [the victim] did become emotional.
>
> There's no question that she did. But the reason and the why did she become emotional? I don't know. [Defendant] doesn't know any more than you know at this point in time. What would be [the victim's] motivation to *make up* this claim against [defendant]?

Viewing this opening statement in the context of defendant's theory of consensual sex, it is evident that the prosecutor's questions to Detlaff, Rahn, and Reedy, were intended to rebut defendant's charge that the victim was fabricating a story about being raped. Accordingly, the prosecution properly presented evidence of the victim's character for truthfulness. *Lukity*, *supra*. See *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996) and *People v Dixon*, 217 Mich App 400, 407; 552 NW2d 663 (1996) (prosecutor's remarks must be reviewed in context of defense arguments and theory of defense).

We disagree with defendant's contention that his opening statement was "notably similar" to the opening statement in *Lukity*, *supra* at 489-490. In *Lukity*, the defense counsel suggested that the victim's emotional nature may have clouded "her ability to recount and describe" what occurred, but did not attack her character for truthfulness by claiming she was "making up" the story. *Id*. Additionally, whereas in *Lukity* the defendant denied engaging in sexual activity with the victim, *id*. at 488, in this case defendant admitted that sexual intercourse occurred but claimed it was consensual. Thus, the defense asserted in this case necessarily and directly attacked the victim's truthfulness. After reviewing the prosecutor's remarks in the context of defendant's opening statement and defendant's theory of the case, see *Schultz*, *supra* at 710, we find that no error occurred. Further, even if we assume there was error, because the jury was able to evaluate the credibility of the victim, the witnesses, and defendant, we cannot conclude that the prosecutor's questions concerning the victim's character for truthfulness affected the fairness, integrity or public reputation of the proceedings or resulted in an actually innocent person being convicted. Accordingly, reversal is not warranted. *Carines*, *supra*.

Likewise, we reject defendant's unpreserved argument that the prosecutor committed misconduct by improperly appealing to the jury's civic duty during closing argument. Defendant contends that that the prosecutor made an improper civic duty argument to the jury by stating that the jury alone could hold defendant "responsible and accountable for his behavior and what he did to this 21 year old woman." However, we are unable to find how this comment appealed to the fears and prejudices of the jury members. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Cooper*, 236 Mich App 643, 651; 601 NW2d 409 (1999). Indeed, such an argument simply reiterates that it is the jury's job to determine whether defendant is guilty of the alleged crime.[1]

C. Sentencing Issues

Defendant also contends that the trial court sentenced him on the basis of inaccurate and improper information. Defendant maintains that the four juvenile assaults relied on by the trial court were not adjudications under the guideline definitions and that defendant's juvenile history had already been considered in the guideline scoring, so that the trial court erred when it

[1] Defendant also claims that the prosecutor improperly vouched for the victim's credibility and improperly asserted that defendant was a "liar." However, defendant's brief fails to identify as issues on appeal claims that the prosecution's closing argument improperly appealed to the jury's sympathy or that the prosecutor improperly stated a personal belief as to defendant's credibility. Because defendant failed to present these arguments pursuant to MCR 7.212(C)(5), the issues are not properly before this Court for our review. *In re BKD*, 246 Mich App 212, 218; 631 NW2d 353 (2001); *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (2000).

considered the Youth Parole Board's findings that defendant committed four juvenile assaults. Defendant also claims that the trial court erred when it found that defendant committed the present crime while on felony probation. We disagree.

First, because defendant failed to raise these issues either at sentencing, in his motion for resentencing, or in his motion for leave to remand to the trial court,[2] these issues are again unpreserved, *Grant*, *supra*; *Schutte*, *supra*, and thus our review of these issues is limited to determining whether plain error occurred that affected defendant's substantial rights. *People v McCrady*, 244 Mich App 27, 32; 627 NW2d 721 (2000), citing *Carines*, *supra* at 774. The sentencing guidelines provide that a juvenile adjudication should be considered whenever the conduct involved would have resulted in a commission of a felony or misdemeanor if committed by an adult. See MCL 777.53, 54, and 55. There is no dispute that all of defendant's prior juvenile adjudications would have been misdemeanors or felonies if committed as an adult. As such, reference in the PSIR to each of those juvenile offenses was not plain error. See MCL 777.53, 54, 55. In addition, rather than stating that the PSIR did not consider the juvenile offenses, the trial court instead found that because four of those juvenile offenses were assaults, the scoring of those offenses did not properly take into account the relationship between defendant's previous assault adjudications and his present crime. This finding is not plain error.

Further, the PSIR established that defendant committed gross indecency between males while on felony probation for his conviction of attempted possession of a dangerous weapon, MCL 750.224(1), and the accuracy of the PSIR was not challenged by defendant. Thus, the trial court appears to be referring to defendant's conviction for gross indecency when it stated that defendant committed "this crime while on felony probation." Nonetheless, even if the trial court erroneously believed that defendant was on felony probation when he committed the instant crime, because defendant committed the previous felony while on felony probation, and the trial court provided other substantial and compelling reasons for departing from the guidelines, any error was harmless. MCL 769.26; MCR 2.613(A).

Defendant further argues that the trial court failed to provide sufficient reasons for departing from the recommended minimum sentence of 36 to 106 months, and that his sentence was disporportionate. We disagree.

MCL 769.34(3) provides:

> A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in [MCL 777.1 *et seq*.] if the court has a substantial and compelling reason for that departure and states on the record the reasons for the departure.
>
> (a) The court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by

[2] Defendant's motion for remand and motion for rehearing challenged an alleged error in scoring Offense Variable Eleven, not the trial court's reliance on defendant's four juvenile adjudications for assault or the finding that defendant committed the instant crime while on felony probation.

appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.

(b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

Unlike the judicial guidelines, the legislative guidelines apply to habitual offenders. MCL 777.21(3)(b) provides:

(3) If the offender is being sentenced under section 10, 11, or 12 of chapter IX [MCL 769.10 – 769.12], determine the offense category, offense class, offense variable level, and prior record variable level based on the underlying offense. To determine the recommended minimum sentence range, increase the upper limit of the recommended minimum sentence range determined under part 6 [MCL 777.61 – MCL 777.69] for the underlying offense as follows:

* * *

(b) If the offender is being sentenced for a third felony, 50%.

Because defendant's crime was a class C felony at the time it was committed,[3] defendant's minimum sentence range is determined by calculating the offense variable level and prior record variable level, referencing MCL 777.63, and increasing the minimum sentence by 50%. Here, the PSIR placed defendant in the offense variable level IV and prior record variable D. Accordingly, defendant's minimum sentencing range under MCL 777.63 was 36 to 71 months. Increasing the upper limit of this range pursuant to MCL 777.21 increasing defendant's minimum sentence to 36 to 106.5 months. Thus, there can be no question that defendant's minimum sentence range accounted for his two previous felonies. Therefore, the questions before us are (1) whether the PSIR gave inadequate or disproportionate weight to defendant's previous felonies and juvenile convictions, and (2) whether the trial judge articulated substantial and compelling reasons for departing from the sentencing guidelines. We answer "yes" to both of these questions.

In *People v Babcock*, 244 Mich App 64; 624 NW2d 479 (2000), this Court relied on *People v Fields*, 449 Mich 58; 528 NW2d 176 (1995), and held that to find substantial and compelling reasons for departing from the guidelines under MCL 769.34(3), a trial court must rely on "objective and verifiable" factors. *Babcock*, *supra* at 75, citing *Fields*, *supra* at 69-70. Here, the trial court specifically indicated that it was departing from the sentencing range because defendant's criminal history indicated that it was necessary in order to protect society from defendant. In addition, the trial court provided the objective and verifiable facts that defendant had committed at least twenty major misconducts of an assaultive and dangerous nature while in prison, that defendant's crimes continued to increase in severity, and that the

[3] PA 2000, No 279, effective October 1, 2000, made CSC III a class B felony.

sentencing guidelines failed to provide sufficient weight to defendant's past juvenile record. Further, a review of the sentencing hearing and the PSIR establish that the trial court did not use inappropriate factors in departing from the sentence range, MCL 769.34(a); rather, the record establishes that the trial court based its decision to depart from the guidelines because the PSIR failed to give adequate and proportionate weight to particular facts. MCL 769.34(b).

Because the trial court properly articulated objective and verifiable factors that supported deviating from the minimum sentencing range, *Babcock*, *supra*; MCL 769.34(3), and defendant's sentence adequately reflects the seriousness and nature of the crime committed, *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000); *People v Rice (On Remand)*, 235 Mich App 429, 46; 597 NW2d 843 (1999), it is clear that the trial court appropriately exercised its discretion when it deviated from the guidelines in sentencing defendant. *Babcock*, *supra* at 75-76. Further, since the record indicates substantial, compelling reasons for deviating from the guidelines, we conclude that defendant's sentence adequately reflects the seriousness and nature of the crime committed. *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000); *People v Rice (On Remand)*, 235 Mich App 429, 446; 597 NW2d 843 (1999). As such, we are unable to conclude that defendant's fifteen to thirty year sentence was plain error or that it affected defendant's substantial rights. *McCrady*, *supra*.

We also reject defendant's claim that the trial court was not aware that it could impose a sentence less than the maximum term of thirty years. A review of the sentencing hearing establishes that the trial court stated that defendant's could be sentenced to "a maximum *possible* sentence of [thirty] years." Hence, while it is evident that the trial court was aware that defendant could be sentenced to thirty years, nothing in the record supports defendant's contention that the trial court was unaware that he could sentence defendant to a lower maximum sentence. Indeed, the trial court's comments at the sentencing hearing illustrate that the trial court realized the importance of detailing its departure from the sentencing range, which clearly did not call for the maximum sentence of thirty years.

D. Ineffective Assistance of Counsel Claim

Finally, defendant contends that because his counsel failed to object to the sentencing errors addressed above, he was deprived of the effective assistance of counsel. Because defendant failed to raise this issue in a request a new trial or a *Ginther*[4] hearing, our review is limited to errors apparent on the record before us. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). In this regard, our resolution of the previous issues establish that no sentencing errors occurred. Therefore, because counsel is under no obligation to raise meritless objections, *People v Torres*, 222 Mich App 411, 425; 564 NW2d 149 (1997); *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991), defendant has failed to establish that his counsel's performance fell below an objective standard of reasonableness or that there was a reasonable probability that absent counsel's failure to object, the proceedings would have been different. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

---

[4] *People v Ginther*, 390 Mich 436, 212 NW2d 922 (1973).

III. Conclusion

Because (1) the trial court did not abuse its discretion when it failed to allow defendant to elicit hearsay testimony from Rhan during cross-examination, (2) the prosecutor did not commit prosecutorial misconduct, (3) the trial court did not sentence defendant on the basis of inaccurate or improper information, (4) the trial court articulated substantial and compelling reasons for departing from the guidelines, and (5) defendant was not denied effective assistance of counsel, we conclude that defendant's conviction and sentence were appropriate.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Michael R. Smolenski